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ABSTRACT

The author shows that one branch of the Federal Government can and does largely protect the confidentiality of the accrediting process through legislation while another has legislative authority to secure any and all documents--both from another federal agency or from the accrediting body directly. Legislation proposed in the State of California, if passed, could, in the name of full disclosure, effectively force nongovernmental accreditation to cease operating in that state. These aspects and others of the dilemma facing all accrediting bodies regarding confidentiality of the accrediting process is rationally and legally explored.
(Author/LBH)

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Louis H. Heilbron

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Foreword

Louis Heilbron is a stalwart lay person in postsecondary education as attested to by his long and devoted volunteer service to its cause.

An attorney at law associated with a San Francisco firm, Mr. Heilbron has written extensively on educational matters, particularly in the field of governance. He is former chairman of the California State University and College System and former president of the California State Board of Education.

Prior to accepting one of the nine public positions to the board of the Council on Postsecondary Accreditation, he served in a similar capacity on the Council of the Federation of Regional Accrediting Commissions of Higher Education—a COPA predecessor organization along with the National Commission on Accrediting.

Mr. Heilbron gave generously of his time in researching and writing this paper. He was compensated only for his expenses and a small fraction of his time. Again, this is a tribute to the caliber of members on the COPA Board, as well as others who are contributing papers in this series of *Occasional Papers*.

Confidentiality and Accreditation is particularly significant at this point in time. Mr. Heilbron has learned that one branch of the Federal government can and does largely protect the confidentiality of the accrediting process through legislation while another has legislative authority to secure any and all documents—both from another Federal agency or from the accrediting body directly. He has also discovered that legislation proposed in Mr. Heilbron's home state of California, if passed, could, in the name of full disclosure, effectively force nongovernmental accreditation to cease operating in that populous state.

These aspects and others of the troublesome dilemma facing all accrediting bodies regarding confidentiality of the accrediting process is rationally and legally explored by Mr. Heilbron. We think his paper is a genuine contribution to the literature of accreditation and postsecondary education.

Kenneth E. Young
August 1976

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Confidentiality and Accreditation

Louis H. Heilbron

I

Confidentiality

The post-Watergate period has been marked by an accelerated trend toward requiring public disclosure of anything that smacks of public business—campaign contributions, Congressional committee meetings, government records, and the records of quasi-governmental agencies. The "people's right to know" has motivated much of the reform legislation. It is not surprising that the activities of accrediting agencies should become the subject of some of this attention and proposals for disclosure.

Yet recently some second thoughts have been expressed about the desirability of demanding complete openness about everything. If there can be no confidences, there may be no government. No one expects the Supreme Court to deliberate in public. Diplomatic settlements cannot be negotiated in public. The Executive Branch may possess information it cannot disclose in the interest of national security. Government must keep some confidences in order to function.

About a year ago Edward H. Levi, Attorney General of the U.S., delivered an important address on the subject of "Confidentiality and Democratic Government."[1] Many of his observations are pertinent to the confidentiality problem affecting accreditation, particularly his conclusion that there are no easy answers. He posed the issue as follows:

> Government confidentiality does not stand alone. It is closely related to the individual's need for privacy and the recognition we frequently give to the needs of organizations for a degree of secrecy about their affairs. It also exists alongside the American citizenry's need to know and government's own right to investigate and discover what it needs to know . . . One reason for confidentiality, for example, is that some information secured by government if widely disseminated would violate the rights of individuals to privacy. Other reasons for confidentiality in government go to the effectiveness—and sometimes the very existence—of important governmental activities.

Mr. Levi points out that the individual's right to privac ' is often grounded in the First (thoughts and beliefs) and Fourth Amendments (protection of persons and their communications against unreason-

able searches and seizures) of the Federal Constitution. It is also supported by testimonial privileges granted by statute to protect the confidentiality of certain relationships, such as husband and wife, lawyer and client, doctor and patient, "against unwarranted intrusions whether by the government or public."

The government must respond to the theory of democracy—that the electorate be informed. Therefore the government must disclose information about its operations. The Freedom of Information Act,[2] consistent with this commitment, has opened up for inquiry "the myriad workings of government." But there are a number of exceptions; "some confidentiality is a matter of practical necessity." It comes down, continues Mr. Levi, to a conflict of values: "a right of complete confidentiality in government could not only produce a dangerous public ignorance but also destroy the basic representative function of government. But a duty of complete disclosure would render impossible the effective operation of government."

This principle has been applied to private organizations. In a landmark case the NAACP was protected in its right to hold its membership list from public disclosure because to require its release would have exposed the members to harassment and ultimately may have destroyed the organization. A measure of confidentiality is required in the decision-making process of the Executive Branch. The Attorney General cites the Supreme Court in *U.S. v. Nixon*:[4] "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process."

What we are seeking in governmental operations (and this may well apply to quasi-governmental operations or even private public service agencies) is how best to satisfy the public interest. The public right to know must be weighed against disclosure which reduces the possibilities of getting at the truth or seriously impairs the government's ability to operate in the public interest. When disclosure defeats the purpose of inquiry, it may no longer be in the public interest to demand it.

Thus confidentiality and disclosure are forever in a state of tension, but the overriding principle may be that confidentiality must be protected if disclosure would frustrate the legitimate purposes of government or of quasi-public agencies.

A further consideration may be in order. Confidentiality connotes a somewhat different purpose than secrecy. A secret suggests something "hidden or concealed;" a confidence indicates a communication given in trust and not to be publicly disseminated.[5] It is a distinction that is well understood in the academy but not too easy to communicate to a legislative committee.

II

Accreditation

The other focal term is accreditation. In view of its long history it should be simple to define. What is accreditation? In the words of Council on Postsecondary Accreditation

policy: "The public has come to expect accreditation to be a prime indicator of educational quality." In arriving at the decision to accredit, the accrediting agency must, according to COPA, "recognize the right of institutions or programs to be evaluated in the light of their own stated purposes so long as those purposes demonstrably fall within and adequately reflect the definitions of general educational purpose or programs established by the accreditation body."[6] As a result, the criteria are twofold: while the institution does establish and control its own objectives, and the status of the institution is to be evaluated on the basis or progress made to realize these objectives, there are minimum acceptable educational standards which the institution must meet.

Selden states that "accreditation" has been defined as "a process whereby an organization or an agency recognizes a college or university or a program of study as having met certain predetermined qualification standards."[7] Representatives of the Association of Independent Colleges and Schools have said, "Accreditation is peer participation in a judgment measuring the quality of education by preestablished criteria."[8]

Yet many accrediting agencies perceive the functions of accreditation as much broader than those embodied in the above definitions. They stress other purposes such as improving education, improving standards, assuring adequate educational preparation of professional practitioners, identifying acceptable institutions and programs, and consumer protection.[9] The Federal Office of Education recognizes the purpose of accreditation as "the development and maintenance of educational standards" but sees the role of private accreditation agencies more through functions than through definition. That agency lists the following functions of private accreditation:[10]

1. Certifying that an institution has met established standards;
2. Assisting prospective students in identifying acceptable institutions;
3. Assisting institutions in determining the acceptability of transfer credits;
4. Helping to identify institutions and programs for the investment of public and private funds;
5. Protecting an institution against harmful internal and external pressures;
6. Creating goals for self-improvement of weaker programs and stimulating a general raising of standards among educational institutions;
7. Involving the faculty and staff comprehensively in institutional evaluation and planning;
8. Establishing criteria for professional certification, licensure, and for upgrading courses offering such preparation; and
9. Providing one basis for determining eligibility for federal assistance.

The accrediting agencies generally agree that their function is to assist institutions and improve their standards, and that the whole system is designed for self-regulation and self-improvement. However, the agencies do not agree that their functions are necessarily those listed by the Office of Education. In a number of Congressional hearings, representatives of accrediting agencies have spent considerable time testifying as to what accreditation "is not."[11] Kirkwood has written persuasively on

"The Myths of Accreditation."[12] What accrediting bodies seem to oppose most are statements that they have responsibility through accreditation for the protection of students as consumers or for assuring the financial stability of the institutions they accredit.

Most important is the scope of the accreditation. If it is limited to the certification of educational quality as of a given time, the area of confidentiality may be more circumscribed than it would be if noneducational matters are considered. But the line between noneducational matters is difficult to draw in terms of educational quality. Certainly educational quality can be evaluated on the basis of applying objective criteria to admission requirements and procedures, curriculum, plant, library, education of faculty, research publications, number of full-time and part-time faculty, administrative controls, enrollment in relation to curriculum and faculty, etc. But also the accrediting process does pay attention to the funding of the institution or program in relation to its ability to carry out both the minimum acceptable and the stated purposes.

An open question may be whether, if catalogs or representations to students promise job opportunities or placement after completion of the educational program, the data submitted to the accrediting agency support these statements of objectives. It is conceivable that the quality of education may be outstanding, but the ability of the institution to place its graduates may be meager. Certainly there should be some relationship between the success of graduates (particularly in the professional and vocational area) and the quality of the education they receive for their career work. If accreditation does not take into consideration such claims of placements, then the disclaimer should be made clear and no data collected with respect to this aspect of the institution's program. (A disclaimer to students would be difficult to communicate.) If no information is collected, no problem of confidentiality can later arise. But if the "probity" of an institution's representations is a subject for accreditation (as legislation in the current Congress proposed and as the U.S. Office of Education wants to require in connection with its recognition of accrediting agencies), then accreditation may imply that any postgraduate commitments of the institution are being reasonably fulfilled.

For the purposes of this paper it will be assumed that accrediting agencies will satisfy themselves that financial underpinnings exist which support (1) acceptable educational quality and (2) reasonable attainment of the stated objectives of the institution. It also will be assumed that if the institution or program makes representations to students concerning postgraduate or post-training placement that the truth or falsity of these representations will be considered in the review process.

III

Importance of Accreditation as Related to Confidentiality

The combination of the monopoly powers and public interest in accreditation has often been referred to in the literature dealing with

accreditation. A California State Senate Report in 1962 contends that accreditation may spell "life or death for many of our collegiate institutions."[13] An article in the *Washington Post* states that disaccreditation* stigmatizes the institution, jeopardizes the admissions of students who may wish to transfer to other institutions, and hinders the admission of graduates to graduate schools. Disaccreditation of a professional school is serious for students who may later seek licensure for professional practice in a state in which admission to take the licensure examination is partially dependent upon graduation from an accredited institution.[14]

Moreover, it is argued, that the number of accrediting agencies is limited both as to geography and professional or vocational subject matter. The six regional accrediting associations have almost exclusive accrediting rights in their respective areas. The national, specialized agencies cover the established professions and vocations. Only a few recognized accrediting agencies exist specifically for proprietary schools. While it is lawful for any group to organize its own accrediting agency, if the agency is not recognized by COPA because it does not meet its standards the agency will not have significant authority. And added to the powers previously described, it is the fact that the eligibility of institutions or programs to enroll students receiving federal or state grants in aid or insured student loans is partially dependent on the accredited status of the institution or program. Also it should be noted that accrediting agencies are substantially supported by dues paid by public universities and colleges using public funds.

The accrediting agencies do not deny their public service function. They are frequently characterized as quasi-public agencies. And as such, the area of confidentiality is likely to be limited. The less monopoly power or public function the accrediting agency exercises, the more confidentiality it may be able to enjoy.

Accrediting agencies are varied in character and operate under different circumstances. In some states or districts there may be public authority providing an alternative for accreditation; for example, a school board, or a state body created by a statute on the model of the chartering and licensing statute recommended by the Education Commission of the States. Further reference will be made later to the effect of this kind of legislation.

For the moment it seems fair to characterize accrediting agencies in general as affected by a public purpose. Some may be deemed to be "state actors," i.e., agencies whose conduct is subject to the due process and equal protection clauses of the Federal Constitution. Their procedures then must meet the requirements for due process, which usually include notice, fair hearing, opportunity for review or appeal, etc.; and substantively they will not be permitted to engage in arbitrary action. But even if they are not state actors, since their educational functions affect the public interest, the courts will intervene to prevent unfair procedural practices or the perpetration of substantial inequity.

*Denial of accreditation will have substantially the same effects as disaccreditation.

The effect is close to requiring due process.

This means that an accrediting agency may at best be able to keep confidential only the kind of records or information that, if disclosed, would seriously impair its operations. This may mean also that if an accrediting agency is accused of arbitrary action in refusing accreditation predicated on unidentified statements or rumors, a court may require it to disregard such testimony and base its decision on other testimony before it or hold a hearing where the institution is given the opportunity to examine adverse witnesses. In other words the agencies may be given the alternative of disclosing or disregarding.

IV

Sensitive Information

An accrediting agency gathers all kinds of information in the course of its investigation. Much of it cannot be regarded as confidential: the charter or articles of the institution, the names of the trustees and chief administrators, the published curriculum, the number of faculty, student enrollment, location of facilities, and any number of other items. However, they do receive data in sensitive areas, many of which appear in the self-evaluation report. This is the basic device developed by private accreditation. The effort is to obtain a candid statement of all of the operations of the institution or the program in order that the institution itself may determine to what extent it is stating its purposes and approaching its goals, in what areas its weaknesses lie, and what improvements are required. This statement not only is valuable in indicating to the members of the investigative team many of the important aspects of the institution or program, but it enables them as experts to suggest and advise on constructive actions that the institution may take. The admission of weaknesses is not a bar to accreditation but the initial step forward to self-improvement. As previously indicated, the improvement of standards is a primary function of the accrediting process.

This self-evaluation is received in confidence[15] and it would probably destroy one of the most important elements in accreditation if it were required to be made generally public.

However, the institution or the program may wish it to be publicized and the institution or program is advised that it is free to do so.[16] Such measure of confidentiality as may exist with respect to the team report also may be waived at any time by the institution or program.

The investigative team may gather other materials that are sensitive:

1. Faculty may express critical views about their department heads, deans, or administrators relative to the quality of education and the academic climate in which it is offered.
2. Students may offer critical views regarding the curriculum, the value of class experience, the effectiveness of professors.
3. Administrators may express views critical of each other or of certain faculty on matters relating to educational quality, but necessarily constituting personal evaluations as in the cases of 1 and 2.

4. Financial data may involve the current status and financial prospects of the institution.
5. Proposed acquisitions of adjacent lands and campus expansion may be revealed which, if publicly known, would cause prices to rise and possibly defeat the purchase.
6. Loose financial practices may be admitted.
7. Improper statements may be admitted regarding the nature of the instruction or assurances of results, particularly in employment.
8. Defamatory material may be stated especially with respect to 1, 2, 3 and 6 (concerning the professional or personal conduct of individuals).
9. Student records may be reviewed.[17]

The list is not intended to be exhaustive. The consideration of one or more of them may have a serious impact on the decision to accredit. A guarantee to cease and desist a borderline practice may satisfy the accrediting commission. But if the accrediting commission disclosed the information, it might do harm to an institution prepared to correct its deficiencies. More importantly, disclosure may cut the flow of such information in the future.

Again, it should be noted that the institution or program is free to release the team report affecting any of these matters. Therefore the institution will probably not be the complainant asking for the release. But under certain circumstances it could be demanding details upon which the team report was based. If the institution or program claims that certain of the team findings are untrue and that these are the statements critical to the decision, then the complainant may ask for the accrediting agency to disclose the sources of information in order that the institution or program may confront them.

Many other persons or agencies may be interested in the information. Students may want to know the conditions of the institution or program even though they attended knowing that it was not accredited. Faculty may desire to uncover these conditions on the basis that they believe that the administration would prefer to conceal deficiencies rather than to make changes in administration and achieve accreditation. A legislator from the area in which the institution or program is located may demand the information in order to determine whether in his view his constituent was treated unfairly. If the institution is sufficiently visible, it may attempt to develop information through demands for a legislative investigation.

Basically, however, if the institution or program is demanding accreditation and considers that it is justified on the merits, it can be expected to go through the appeal procedure, to release all the information in its possession, and to pull down any curtain of confidentiality that it believes is shielding the accrediting agency.

The other side of the accrediting picture is that, once accredited, faculty or students may claim to have relied on the seal of approval as a basis for making commitments. If they assert that accreditation was negligently given, they may demand release of confidential materials in order to prove their case—either by showing that the incriminating information was gathered and disregarded or was available but improperly overlooked. The more likely

case is for the plaintiffs to assume that accreditation implied investigation by the accrediting agency of the representations made by the institution or program regarding the quality and effectiveness of the training and the employment opportunities for those completing the prescribed curriculum.*

A California consumer's product case suggests some analogy to accreditation.[18] A purchaser of allegedly defective shoes sustained injury from a fall while wearing the shoes and thereafter sued for damages. The defendants included the manufacturer, the retail store, and the Hearst Corporation as owner of *Good Housekeeping* magazine. The plaintiff alleged that she relied partly in making the purchase on the "Good Housekeeping Consumer's Guarantee Seal." With respect to this seal the magazine stated: "This is Good Housekeeping's Consumer's Guarantee," and "We satisfy ourselves that products advertised in Good Housekeeping are good ones and that the advertising claims made for them in our magazine are truthful: . . ." The court said:

> The basic question presented on this appeal is whether one who endorses a product for his own economic gain, and for the purpose of encouraging and inducing the public to buy it, may be liable to a purchaser who, relying on the endorsement, buys the product and is injured because it is defective and not as represented in the endorsement. We conclude such liability may exist and a cause of action has been pleaded in the instant case. In arriving at this conclusion, we are influenced more by public policy than by whether such cause of action can be comfortably fitted into one of the law's traditional categories of liability.

The court was impressed by the seal and said:

> Implicit in the seal and certification is the representation respondent has taken reasonable steps to make an independent examination of the product endorsed, with some degree of expertise, and found it satisfactory. Since the very purpose of respondent's seal and certification is to induce consumers to purchase products so endorsed, it is foreseeable certain consumers will do so . . .

A few comments are in order. In the products case the grantor of the seal was making money for its own account through advertising. It was purposefully inducing purchasers to rely upon the seal. It was "endorsing" products that could cause physical harm and had "voluntarily involved itself into the marketing process." By way of contrast, accrediting agencies do not seek to approve; applicants ask for approval. The accrediting agencies do not perform their service for pecuniary gain. There is no intentional effort by the agencies to reach students and to induce them to rely. The quality of education is not as clearly determined as the safety of shoes. Nevertheless, there are some common elements in the situations, particularly if actual reliance on the "seal" can be demonstrated, and in such a case pertinent reports in the agency files may be subpoenaed, at least by the time of trial.

*Even if the accrediting process were held to cover the representations, plaintiff students would still have to prove reliance on the "seal" and that their lack of success was not due to their own want of effort and ability.

V

Judicial Attitudes

There are very few cases involving accrediting agencies and apparently only one which, by dictum, concerns confidentiality questions.* The tenor of court cases has been to defer wherever possible to the expertise of the accrediting agency. Until recently the courts emphasized the private, voluntary nature of accrediting associations to support their decisions.

In a case involving a regional accrediting association[19] a state sought an injunction to prevent the agency from removing a state school from the agency's list of accredited colleges. The court decided in favor of the accrediting agency, noting that the state school had assented to the agency's constitution and rules and particularly that the state had not claimed fraud, arbitrariness, or breach of contract, the only grounds which, in the court's opinion, would justify judicial intervention. The court also indicated that the accreditation agency was not a "state actor" bound by the Federal Constitution. Said the court:

> [I]t is vain to appeal to a constitutional bill of rights, for such bills of rights are intended to protect the citizen against oppression by the government, not to afford protection against one's own agreements. *Id.* at 700.

Plaintiff-school in a Colorado case[20] sought a judgment declaring unconstitutional a state statute which forbade a college from granting degrees unless the college offered credits transferable to at least one school accredited by one of five designated regional accrediting agencies. Plaintiff asserted that the statute was a standardless and therefore unconstitutional delegation of power to accrediting agencies. In deciding against plaintiff, the court described accrediting agencies as follows:

> They are voluntary, nongovernmental agencies which are accountable only to their own membership.† Their purpose is to evaluate educational institutions according to standards and criteria which have evolved over many years of experience commencing in the 1800's. They accredit—that is, admit to membership—those colleges and universities they deem qualified. Their accrediting standards and criteria are not governmentally imposed.

The court refused to void the statute apparently because of the special expertise of accrediting agencies. Declared the court:

> [W]e deem it entirely appropriate in the field of higher education to leave recognition of academic achievement to those institutions and associations which are uniquely qualified by professional training and experience to make such judgments.

Easily the best publicized case respecting accrediting agencies is that involving Marjorie Webster Junior College.[21] Plaintiff in Marjorie Webster was a proprietary, i.e., for profit, junior college which defendant accrediting agency refused even

*See Section VI.

†This holding indicates that accrediting agencies have no duty to students or the public (only to the institution or program) and would support an argument that students have no standing in court to complain against an accrediting agency on the ground of negligent accreditation. If they have no legal standing, they could not demand access to accrediting agency records.

to consider for accreditation pursuant to defendant's categoric policy to review only nonproprietary schools.

The District of Columbia Court of Appeals upheld the accrediting agency. The court conceded that it might be required to subject the matter to judicial scrutiny if accreditation by the accrediting agency was a prerequisite to the plaintiff's effective functioning as a junior college. But this was not the case. Despite the agency's refusal to consider the plaintiff's application, it remained "accredited" by the District of Columbia Board of Education and it continued to be licensed to award degrees. The court also noted that the plaintiff was free to join with other proprietary schools to set up an accrediting agency solely for proprietary schools. The court was confronted with plaintiff's argument that the agency had been arbitrary in denying due process. The court concluded that, even assuming the accrediting agency was a state actor, its policy was rationally based with the result that it satisfied substantive due process standards. The court concluded that the agency reasonably could have decided that the profit motive could detrimentally affect a school's educational effectiveness and therefore reasonably support its policy of excluding proprietary schools from its accreditation process.

The case of *Rosenthal v. State Bar Examining Comm.*[22] is another decision sustaining governmental deference to an accrediting association, in this case the American Bar Association. The court said:

> It is a matter of common knowledge that the [ABA] is a representative body composed of members of the bar from every part of the Union; an organization national in scope, whose purpose is to uphold and maintain the highest traditions of the legal profession.

Yet it is quite possible that with the current trend some accrediting agencies, sooner or later, will be held to be state actors.

The *Marjorie Webster* case approached the question by assuming this status for the sake of argument and then determining that it was immaterial to the decision. Cases involving the National Collegiate Athletic Association holding the Association to be a state actor may be in point. In *Howard University v. NCAA*[23] the court was impressed by the fact that state schools and the activities of the NCAA are very much "intertwined" and such schools comprise much of the NCAA membership. Officers, faculty members, and other employees of the state schools play substantial roles in the NCAA. The court in the Howard case declared:

> [T]he NCAA and its member public instrumentalities are jointed in a mutually beneficial relationship, and in fact may be fairly said to form the type of symbiotic relationship between public and private entities which triggers constitutional scrutiny.

A court may reach a similar result in the case of an accrediting agency with a substantial public postsecondary membership. Just as the NCAA requires that members conform with its rules on athletic scholarships and other eligibility requirements under near monopoly conditions, many accrediting agencies do require compliance with minimum educational standards under similar conditions.

In *Howard v. NCAA* the court held that because the NCAA was a state actor, its exclusion of Howard University from an NCAA soccer tournament had to comport with procedural due process requirements. These were met. Although resolution of the question whether the NCAA had to disclose its files was not necessary to the disposition of the case, the court pointed out:

> Here, where the facts showing violations of NCAA rules were not disputed by Howard, the fact that an investigation report was not disclosed . . . does not constitute denial of due process, even though in some other context some type of . . . access to investigative reports, if relied on by the [NCAA] might be required.

Even assuming that the law has changed in recent years and it would be held that an accrediting agency is a state actor, it would not necessarily follow that parties adversely affected by accrediting agency decisions would have access to *all* of the information in the accrediting agency's files. The Howard case suggests that if the investigative report were the determining factor in the NCAA decision, the Association may have to yield "some type of . . . access." Insofar as the team report is concerned in the accrediting agency situation, the question seems moot regarding an institution because that report is made available to the institution; however, other material in the files of the accrediting agency (such as letters from faculty), if alleged to be determinative of the agency's accreditation, may be reached by the institution in court proceedings.

If an accrediting agency is held to be a non-state actor then access to the agency files may be still more limited. The right to obtain files is closely tied to the right to confront adverse witnesses. A survey reported in a 1963 comment in the *Harvard Law Review*[24] concluded that the majority of cases respecting the procedural rights of persons adversely affected by the decisions of private organizations would not accord such a right. And the same principle was applied to a state institution in a Tennessee case[25] involving the rights of medical students expelled from a state school. The court observed:

> As to [an expelled student's] right to meet his accusers face to face in an investigation of wrongdoing, we cannot fail to note that honorable students do not like to be known as snoopers and informers against their fellows . . . . In these circumstances they should not be subjected to cross-examination and, as is often seen in a trial court, to their displeasure if not their public humiliation. It would be subversive of the best interests of the school, as well as harmful to the community.

In any event, it appears that whether or not accrediting agencies are state actors the courts will be slow in granting individuals access to information of a sensitive character in agency files as exemplified by opinions of faculty members, students, or administrators and perhaps in relation to most of the sensitive areas listed in Section IV.

It may be expected that courts will be more inclined to require disclosure of records where the institution is the moving party than where third parties are the claimants, except in clear cases by third parties involving fraudulent representations by institutions which were or should have been investigated by the accrediting agency.

VI

Evidentiary Consideration and Protective Orders

It must be kept in mind that accrediting associations do not have a statutory privilege that can be invoked in court to prevent disclosure of information similar to the attorney/client, doctor/patient privileges. But they do have general evidentiary rights to protect themselves against claims to produce evidence that is outside of the issues of a case. If a government agency or a private party brings an action against an institution and attempts to subpoena all of the records regarding the institution in the accrediting agency's file, the accrediting body should be able to quash the subpoena on the ground that it is insufficiently specific and seeks to procure immaterial information. Even at trial the accrediting agency may assert the nonmateriality of records demanded in the case. An example would be a suit against an institution under the anti-discrimination statutes. Obviously most, if not all, of the records of the accrediting agency are immaterial to the issue. If the agency does not go into the matter of discrimination in the accreditation process, it will have no record in the matter and will return that advice to the court.

A case illustrative of the foregoing is *United States v. State of Louisiana, et al*[26] in which the U.S. sought by subpoena to require the Southern Association of Colleges and Schools to produce "any reports . . . records, notes, papers, studies, correspondence, . . . related to the Visiting Committees of the Southern Association . . . regarding public institutions of higher education within the State of Louisiana." The Federal Government claimed that it had filed a desegregation suit against the state for maintaining a dual system of higher education based on race and that the material sought "was reasonably calculated to lead to the discovery of admissible evidence."

The Southern Association was not a party to the action and its motion to quash the subpoena was granted. The Association submitted three committee reports for court review "in camera" and the court concluded that such reports were irrelevant to the main case. The court said:

> There is nothing in these documents . . . that is either relevant to the issues in this case or that could lead to the discovery of relevant material. These reports are the reports of private committees, not parties to the suit, and they should be accorded the utmost confidentiality. The attempt to get these reports is a fishing expedition of the worst kind . . . they do not . . . have the right to discover materials alien to the question of dual school systems, and pertaining only to the question of whether or not certain state schools meet accreditation requirements.

(The reports did not indicate that the scope of requirements included compliance with the desegregation laws.)

But even if certain information is discoverable, where it is confidential in nature and the release would have serious implications for the future viability of the investigative process of the accrediting agency, there is discretionary power in the courts to fashion protective orders

to safeguard the release of information, and, even in extreme instances, to prohibit disclosure.

The court has this power in instances where the accrediting agency itself is a party and also where the information is requested from it as a non-party to the proceeding. The court is far more likely to limit or prohibit disclosure in the non- or third-party situation. In a recent case in the 9th Circuit[27] the court recognized that invasion of corporate privacy is a proper factor to be weighed when a third party is asked to respond to a subpoena. In discussing tax returns in this case, while recognizing that they were not absolutely privileged, the court stated that, "Nevertheless a public policy against unnecessary public disclosure arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns."[28]

In *Hecht v. Pro Football, Inc.*[29] the District Court of the District of Columbia considered a motion for a protective order under the rules of the court which provide for the quashing of a subpoena if it is "unreasonable and oppressive." There the plaintiff was attempting to obtain financial information from a third party for use in his damage case. The court held that the fact that the evidence might be relevant and admissible at trial would not mandate its disclosure in discovery (preliminary) proceedings.

Rule 26 of the Federal Rules of Civil Procedure gives power to the Federal courts to enter protective orders to limit or prevent disclosure ranging from very limited protection to prevention of the discovery. In particular, Rule 26(c)(7) provides: "that a trade secret or other confidential research, development, or commercial information, not be disclosed, or be disclosed only in a designated way."

The reality of the situation is that a court ordinarily will not totally prohibit access to information where one is a party to a law suit. The more likely resolution in such situations is that a protective order will be entered, limiting the purposes for which the information can be used when the party seeking discovery shows that the issues in the case cannot be fully and fairly adjudicated without the requested information.

Since courts have recognized the peculiar elements and expertise involved in the accrediting process, it can be anticipated that they will respond with care to procedural efforts to maintain confidentiality to the extent possible without jeopardizing the legitimate rights of litigants.

VII

The Federal Interest

The decisions of a number of Federal agencies turn in some measure on accreditation judgments made by accrediting agencies. The extent of such practice is set forth at length in an article by Finkin in the *Journal of Law and Education.* It is entitled "Federal Reliance on Voluntary Accreditation: The Power to Recognize is the Power to Regulate."[30]

The principal Federal agency with an interest in the accreditation

*Discovery is a device through depositions or interrogatories for procuring information from an adverse party prior to trial.

process is the Office of Education. This Office recognizes and publishes a list of accrediting agencies for the purpose of identifying accredited institutions and numerous Federal agencies use such accreditation as one factor in determining eligibility for Federal aid. The Department of Health, Education, and Welfare establishes certain criteria as a basis for such recognition which are set forth in four and one-half pages[31] and include an agency's scope of operations, organization, procedures, responsibility to the general public, to the academic professional or occupational fields involved and to institutions, responsiveness to the public interest (in the structure of the agency's decision-making body and the publication of its evaluation standards), assurance of due process (spelling out the scope of visits and reports), evidence of reliability, and autonomy of the agency. The relatively new conditions are of immediate interest in that the agency must have demonstrated capability and willingness to foster ethical practices, including equitable student tuition refunds and nondiscriminatory practices in admissions and employment.

An accrediting agency must apply in writing for recognition. Since its application is made in the context of the criteria, an accrediting agency may be deemed to have accepted the conditions of the criteria, including its capability and willingness to foster ethical practices. Since this area seems to be outside of educational quality per se and is intended primarily for consumer protection, the information pertaining thereto may not be as confidential in nature as other sensitive information.

Further questions arise as to whether an agency merits continuing recognition by the Office of Education or whether in a particular instance justice is being done under the criteria. May, for example, the Office of Education demand records and files of the accrediting agency in order to maintain or confirm its recognition?

It should be noted that recognition is not obligatory and an accrediting agency need not apply for it. The accrediting agencies existed long before Federal grants for education first appeared. The Federal government wisely utilized the existence of the voluntary agencies, which had many years of proven experience, as one basis for identifying acceptable institutions and programs. In the event of some question in granting or withdrawing recognition, it is always feasible for the Federal agency to request some evidence of current operations from an accrediting agency.

If it does not receive material it may refuse to recognize. It has no right to the material. It cannot demand it as a matter of administrative authority unless the government and the agency enter into some kind of contractual agreement permitting this procedure. Since the agency is already committed to the institution or program to maintain confidentiality as far as possible, it does not appear likely that such an agreement would be made.

It is not pertinent to go into a lengthy discussion regarding the alleged efforts of the Federal agencies to reach beyond Congressional authorization to regulate the substance of education through demands on the accrediting agencies.

Suffice it to say that the accrediting agencies have resisted these efforts and consistently have advised the Congress that they are able to provide the necessary assurances of educational quality. Certainly the accrediting agencies have not become agents of the Federal government in carrying out the accrediting process.

The Federal bureau itself reserves the right to determine eligibility; if no accrediting agency serves an area the Office of Education can do its own "eligibilizing." Also the Office can make an institution eligible for Federal aid if it finds that there is satisfactory assurance that the institution will be accredited within a reasonable time. The accrediting agencies have refused to become monitoring or policing instruments for assuring that the institutions and programs keep proper track of Federal monies, make the necessary collections, develop and apply the essential safeguard regulations. All that the recognized accrediting agencies seek to do is to accredit institutions and programs on their educational merit and make the accreditation available to the Federal government for such use as it may deem suitable.

Actually, the accrediting agency's records do not present difficulties for the Office of Education. When a critical case is presented the accrediting agency is usually quite cooperative and willing to transmit its materials to the Office on a confidential basis. The problem that may present itself is that once in the possession of any Federal bureau the materials may become subject to the Freedom of Information Act (FIA)[32] enabling the public to have access to it.

The FIA requires that government agencies furnish identifiable records in their possession to any "person" regardless of whether such person has shown a need for the records requested. Should the agency refuse the request, the person seeking the records may file an action in the Federal District Court to compel disclosure. The bulk of FIA controversies turns on whether the material sought falls within any of the nine exceptions set forth in the Federal statute. Records which fall within an exception need not be disclosed.

One important exception deals with trade secrets and commercial or financial information which are privileged or confidential. The Office of Education, on advice of its counsel, has taken the position that financial information contained in an accreditation file about an institution or program falls under the exception and has deleted material relating to assets, funding, indebtedness and other money data when otherwise responding to a demand for information under the statute. Another exception in the FIA relates to personnel, medical, and similar files, disclosure of which would constitute a clearly "unwarranted invasion of privacy." The Office of Education (also on advice of its counsel) has applied this exception to protect comments on institution or program personnel regarding alleged personal deficiencies; however information already public, such as degrees or publications of an individual, would be disclosed.

An accrediting agency competing for jurisdiction and opposed to a pending application from another recognized accrediting agency would

be refused access to financial and personnel information contained in the application (and for some reason made available to the Office) just as in the case of any other person. But the personnel exception would not operate to shield a brief analysis of personal competence written into an agency opinion respecting eligibility for Federal research grants.[33]

Whether other Federal agencies would take the same view as the Office of Education on the applicability of exceptions is not known. The word "confidential" has been given a special meaning in regard to the financial exception, namely the information is confidential if it either would "impair the government's ability to obtain necessary information in the future" or would "cause substantial harm to the competitive position of the person from whom the information was obtained."[34] A Federal agency not sensitive to educational matters may take a restrictive view on the "competitive" factor and consider it limited to commercial competition, and then refuse to apply the financial exception to an accreditation file.

Another problem with respect to the FIA is that an accrediting agency might not have any standing to invoke an FIA exception, assuming it applied. It may be that only the Federal agency to which the file was released could request the exemption. The point is not settled.

A special problem arises with the General Accounting Office of the Federal Government. It has authority under the General Education Provision Act as follows:[35]

> The Comptroller General of the United States shall review, audit, and evaluate any Federal education program upon request by a committee of the Congress having jurisdiction of the statute authorizing such program or, to the extent personnel are available, upon request by a member of such committee. Upon such request, he shall (1) conduct studies of statutes and regulations governing such program; (2) review the policies and practices of Federal agencies administering such program; (3) review the evaluation procedures adopted by such agencies carrying out such program; and (4) evaluate particular projects or programs.

There also is general statutory authorization under the Budget and Accounting Act as follows:[36]

> Sec. 312(a). The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds.
>
> Sec. 313. All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment.

Unquestionably the Accounting Office has the right under these statutes to make a survey of Federal agencies dealing with education. It can procure any data with respect to accrediting associations or agen-

cies that the Federal agencies have in their records. But accrediting agencies are not branches of the Federal government and it does not appear that the Accounting Office has a right to demand the files of any accrediting agency.

Actually it should be feasible for the agencies and the government to cooperate in such a survey because the objectives may well be supported by established data or by a composite of views, statements, and opinions; for example, the extent of coordination between Federal, state, and accrediting agencies; the views of Federal, state, and accreditation agencies on the role of accreditation in Federal educational assistance programs; the procedures utilized in accreditation, and any other matters not identified with particular records of particular institutions. But it would not seem appropriate for the Accounting Office to engage in an evaluation of the propriety of the educational standards used by the accrediting agencies. This would constitute Federal action in the educational field of a kind which thus far has been reserved to the states. It may be that the Congress could authorize some general investigation of educational standards and accrediting criteria, but it would be contrary to the traditional position of noninterference taken by the Federal government with respect to the substance of the educational program and the evaluators of its standards; it might be objected to as violative of powers reserved to the states. Of course, the General Accounting Office can require reports and audits from the institutions and programs receiving and expending Federal funds.

VIII

State Regulation and Licensure

The most pressing problems in accreditation are presented by recently proposed state legislation. By the same token, some partial solutions may be indicated by recently enacted state legislation.

The problem proposals (special versions of "Sunshine Laws") are of two kinds: one type of statute would require records in accreditation agency files to be opened up to the public on the basis that tax moneys are paid by state educational institutions as dues to the accrediting agency. The second type would require that the inspections or deliberations, or both, of the accrediting body be conducted in public or under conditions of public access.

The special Florida Sunshine Law[37] affecting accrediting provides that:

> Public funds shall not be used for dues or contributions to any association, group or organization, the records of which are not open for inspection to any citizen of Florida . . . Public records . . . means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

The Act took effect on October 1, 1973.

Since enactment, many accrediting agencies, led by the Southern Association of Colleges and Schools, strongly opposed the legislation. In April of 1975 the U.S. Office of Education notified the Division of

Community Colleges in Florida that enforcement of the Act could result in the withholding of large scale Federal assistance because of the dependence of such assistance on accreditation by the recognized agencies.[38] If the Southern Association ceased its activities within Florida "in order to preserve the confidentiality of its educational assessments and data," the Federal office pointed out that Florida students would lose opportunities to transfer to accredited institutions outside of the state and the chance to be considered for licensed professions in many states. As a result of the criticism, the Florida legislature in June of 1975 approved a "technical correction"[39] which limits the rights of persons to inspect accrediting agency records to those records pertaining to public Florida institutions. Therefore the records of private institutions in Florida and many out-of-state institutions, public or private, have been excluded from the inspection process. The language referring to the right of inspection has also been modified, now reading:

> If public funds are expended by an agency (state, county, district, . . . division, board, etc.) in payment of dues or membership contributions to any . . . association, then all the financial, business and membership records pertaining to the public agency from which or on whose behalf the payments are made, of the association . . . shall be public records.

The records must be open to any person at reasonable times and under reasonable conditions; copies must be furnished upon payment of the actual cost of duplication. The Southern Association has issued a statement that under this new law a multistate accrediting agency is no longer required to reveal its records about institutions not under the jurisdiction of the State of Florida, and it has filed with the appropriate higher education offices a statement certifying that all the financial, business, and membership records of the Southern Association of Colleges and Schools pertaining to each Florida public institution or agency which is a member of the Association are open to public examination in accordance with the requirements above described. (Provision in the law is made for court orders to enforce disclosure which could raise questions of extraterritorial application, as will be later discussed in connection with California legislation, but this issue has been resolved for the Southern Association by its affidavit of acceptance.)

It appears that the phrase "public records" for accrediting purposes may have been more narrowly defined than for the general purposes quoted at the beginning of this section. Different words are used than "public records . . . in connection with the transaction of official business by any agency." The new language is limited to "financial, business, and membership records" pertaining to the public agency. Of course, irrespective of this amendment, financial and business records of a public institution are usually available to the public in budgetary or other forms. "Membership records" may simply mean the record of any contributor or dues-paying institution concerning its status as a candidate, probationary member, pending for renewal, or other membership status. On the other hand, construed broadly, the

phrase may cover all records pertaining to the membership application, evaluations, and action thereon; in effect, the entire file of the institution.

If the latter construction is followed, the Florida situation over a period of time may provide a control experiment of substantial interest and show whether information given by Florida public institutions has been "chilled" as compared with similar material furnished by its private institutions. As yet, we do not know whether all the national accrediting bodies have accepted or are prepared to accept the conditions of the Florida statute, either on the basis of a narrow or broad construction of the term "public records." The risk of some withdrawals is still present.

The second approach to "openness" is illustrated by legislation introduced and amended in 1975 which would add Section 22509 to the California Education Code to read as follows:[40]

> Whenever the accreditation of an accrediting association or any of its agents is a condition to any governmental action, such accreditation shall be deemed to exist only if the association is one which conducts public meetings in California in accordance with Chapter 9 (commencing with Section 54950) of Part 1, Division 2, Title 5 of the Government Code when it is *inspecting and/or deliberating concerning* whether or not to accredit a postsecondary institution located in California or any program of such institution or when it is determining whether or not to change the accreditation of a postsecondary institution located in California or any program of such institution. *(added)*

The California legislative counsel has advised that the bill would be a constitutionally valid regulation of activities of private accreditation associations.[41] The counsel stated that the accrediting association itself would not be bound to follow the requirements of the bill, but unless it did so, a California institution would not be considered to be accredited if accreditation is a condition "to any governmental action." The granting of state scholarship aid would be such an action; permitting social workers, nurses, psychologists, and certain other professional workers to be licensed by reason of their having attended an accredited institution also illustrates the meaning of governmental action. The bill, in counsel's opinion, was sufficiently broad to encompass (for public inspections or deliberations) "any and all steps in the accreditation process which have a significant bearing on the association's final determination to grant, deny, or change the accreditation of an institution or program thereof."

On February 23, 1976, the bill was further amended to require all associations or agencies to conduct public meetings whenever deliberating about accreditation of a postsecondary institution or program located in California. Although the bill would now require public meetings only when a quorum of the decision-making body is present, the language seems to apply to deliberative sessions of the accrediting team when the members are deciding upon their recommendations to their commission or board. Exceptions are provided for executive sessions of the decision-making body for purposes of discussing matters relating to an individual employee or the financial condition of the institution if an executive

session is requested by a chief executive of the institution.

Apparently the bill seeks to prevent any national or regional accrediting association from conducting accrediting activities in California unless it complies with the bill's provisions. Whatever records would be introduced or referred to in a public meeting would be public information. In the net, the latest version seems to be more restrictive of accrediting agencies than the earlier.

The bill as redrawn raises serious questions of extraterritorial application. How can one state limit the Federal Government if the latter chooses to recognize an institution accredited without a public meeting? (In effect, the state would be attempting to modify Federal criteria with respect to the expenditure of Federal funds over which Congress has express authorization.) How can one state enforce its requirement for public meetings outside the state with respect to national and multistate agencies? Actually the bill simply requires public meetings, but it does not specify where they are to be held; as thus amended, it is not clear that it requires in-state meetings and if it does not do so, it cannot effectively control the procedure of out-of-state meetings.

But even if the state would have difficulties of enforcement and imposition of penalties with respect to out-of-state meetings, such legislation could becloud the operations of accrediting agencies until the courts construed the scope of the statute and passed on its constitutionality. The constitutional issue (beyond the question of frustrating Federal expenditures) depends on whether, in the light of multistate interests in accreditation (transferability of credits and mutual, though sometimes qualified, recognition of accredited status by institutions throughout the country), this kind of regulation affecting out-of-state or in-state meetings might be deemed an undue burden on interstate commerce under the Commerce Clause.[42]

However, assuming that the state properly can require in-state public meetings of all accrediting commissions when deliberating on in-state institutions, then if all states followed the same procedure, private accreditation may be compelled to cease operations by reason of the high costs involved.

As a matter of due process, California legislative counsel did say that the means embodied in a statute to accomplish the public benefit intended must bear a rational relationship to the purpose and be reasonably necessary to accomplish it. There is no finding in the cited versions of the bill showing the evils to be remedied or any statement of subversion of the public interest that has resulted from the current procedures of accreditation. If in effect the Act would result in the destruction of the major values of accreditation, particularly as they relate to the improvement of educational standards and the interrelationships of institutions and programs inside and outside of the state, it might be contended that the bill is unconstitutional as representing an abuse of the police power (no reasonable relationship or necessity).[43] Still, the police power is a very broad instrument in

relationship to health, education, and welfare and does not require much rationale to support its exercise.

Again, this bill has been opposed by the accrediting bodies and many institutions on its "demerits." The Western Association of Schools and Colleges has vigorously protested. It has argued the voluntary nature of accreditation, the fact that the manner of procedure is known to the public, that public members are part of the commission overseeing accreditation, that institutions are encouraged though not required to make publicly available their own institution's self-evaluation and the reports of visiting committees and commission action, and that the list of accredited institutions is published annually. The arguments made for confidentiality were as follows:[44]

> Institutions are expected and required, in confidence, to reveal their innermost problems and difficulties and seek advice and assistance in correction or improvement. While all of higher education and the public served by it benefit from accreditation, the two primary beneficiaries are (1) small, new, and struggling, often innovative, private institutions which need but probably cannot afford the resources of high quality counsel and advice which larger private and most public institutions possess; and (2) prospective students and the public generally, because an absolute requirement for accreditation is that an institution be frank and truthful in what it says and that it be reasonably successful in what it claims to do. Were the information revealed or ascertained by visiting committees and the commission to be made public, every effort would be made by the institutions to conceal any weaknesses they might have. Such concealment from professional evaluators who might be of help could in the long run be most damaging to the institution and certainly not in the public interest.

The Senior Commission of the Western Association has stated that it would not comply with the bill, if enacted (in its original form).

Positions of the national associations were not formally and publicly stated, but it is almost impossible to conceive that all of these associations would hold public meetings in California (if the bill ultimately were construed to require such procedure) in order to comply with the law affecting California institutions. If all the accrediting agencies withdrew from California, then the state would face the same potential problems of withdrawal of Federal assistance and transferability of credits as did Florida in connection with its special Sunshine Law. Conceivably the state could set up its own exclusive accrediting body but it might take years before its determinations on accreditation were generally recognized by public and private institutions throughout the country and by the Federal grant agencies. In any case, if the accrediting agencies do not function in a state they have no problems of confidentiality.*

*On March 24, 1976, AB 1854 was heard by the Senate Education Committee and many adverse comments made; the Committee took no action to pass the bill. The Western Association continued its opposition. Reports indicate that a further amended bill is about to be filed, removing some problems and adding others. Apparently only institutional accrediting would remain subject to the open meeting requirement, thereby raising quesitons as to whether some program agencies accredit institutions and whether the attempted limitation constitutes a reasonable classification for control. Other changes are also reported, but the basic issue remains: if 50 states adopt this form of regulation, particularly requiring instate commission meetings, and it is valid, can private accreditation, sustain the burden?

However, a dual system—state and private—relating to accreditation may still provide some answers to the main question of this paper. The Education Commission of the States has recommended a model licensure statute for adoption by the states.[45] Under such a law the state licenses every educational operation for a period of one or two years and establishes certain minimum standards and criteria for licensing. These, in part, refer to (1) the quality and content of each course or program of instruction in terms of achieving the stated objective of the course or program; (2) adequate experience and personnel requirements; (3) qualifications of administrators and faculty; (4) publication of an adequate catalog or brochure to students and interested persons; (5) assurance of appropriate educational credentials on completion of training; (6) adequate records; (7) compliance by the institution with pertinent ordinances and laws relating to safety and health; (8) financial soundness and capability of institution; (9) truthful and fair advertising by the institution and its agents; (10) good reputation and character of trustees, owners and principal staff; (11) safe and adequate housing if maintained by the institution; (12) fair and equitable cancellation and tuition refund policy.

Thereafter it is provided that "accreditation by national or regional accrediting agencies recognized by the U.S. Office of Education may be accepted" by the state administrative agency as evidence of compliance with the minimum standards and criteria established or to be established.[46]

The necessary implication is that unless an accrediting agency advises the state commission that its accrediting policy does *not* cover certain of the standards or criteria, it will be presumed to cover these areas. But if the accrediting agency advises regarding any limitations to the scope of its accreditation, then the state agency is authorized to make an independent investigation with respect to such standards; indeed it may make an independent investigation if it is not satisfied that the accrediting agency's determination has been based on sufficient evidence even though the determination was made within the scope of all the criteria.

The important aspect of licensure is that it applies *to every* postsecondary educational operation in the state, and thus operations which now escape any form of examination or review by reason of not applying for accreditation will find themselves subject to state regulation. The substantial evil of false advertising and recruiting will be dealt with on a broad scale that is not substantially touched by the prevailing form of private accreditation. Even agents who are employed by institutions whose headquarters may be outside of the state are required by the *State Model Act* to procure permits on the basis of evidence of good reputation and character.

Under this system of licensure it is expected that postsecondary educational institutions may operate on two levels: (1) they must meet minimum state standards and criteria; (2) those accredited by accrediting agencies will probably be required to meet higher standards and at the same time be in receipt

of expert assistance to meet such higher standards.

A variant of the *State Model Act* is to exclude any provision for acceptance of "in lieu" accreditation by private agencies. This arrangement cleanly divides licensure and accreditation. Since licensure would involve an open public process, it should be easier for the accrediting agencies to maintain confidentiality because the area of their investigation would be more restricted.

At this juncture, we may be discussing more theory than practice. Certain states adopting the model statute limit its application to proprietary institutions.[47] On the other hand, the New York system of licensure and approval of all institutions and courses (different from the "model") has existed side by side for many years with private accreditation performing its usual function. In other words state licensure does not necessarily restrict the scope of the investigation and accreditation by the private agencies. Indeed, how can it be contended that an accrediting agency is fulfilling its commitment to examine educational quality if it does not make some independent investigation into the financial capability of the institution to carry out its stated objectives? How can it be argued that an agency that purports to examine an institution with respect to its progress toward or fulfillment of stated objectives may disregard an institution's claims regarding the practical value of the program of instruction?

In a dual system, the increase in confidentiality for the private agencies may be more the result of the fact that claimants can learn all they want to know from the public agency, without resorting to the private agency records, than from any substantial narrowing of the scope of the private agency investigation. A state agency demands an application from each institution or program to be licensed, and the representations made in these applications as to educational quality, finance, and truthfulness in advertising are probably actionable in themselves. Moreover if any question arises in connection with these materials, the state agency may hold a public hearing with all its powers of subpoena and with all the requirements of public disclosure inherent in the government process. The chances for an erroneous accreditation are considerably cut down by the licensing procedure; indeed, since accrediting is a slow and considered process, prior licensure may be deemed a requisite. In New York a copy of the action taken by the Board of Regents regarding approval is automatically sent to the regional private accrediting agency.

A state licensure means that an accrediting agency can consider the improvement of educational standards as perhaps its primary objective and assists it further in establishing some necessary basic uniform values throughout the country because of the regional and national character of the accrediting agencies. This unique contribution of the accrediting agencies has been well stated by the U.S. Office of Education.[48]

> Accrediting agencies do not have the regulatory function inherent in State and Federal program regulation. However, they provide a depth and consistency to the evaluative process which is not present to any great degree in Federal or State regulations, and their

judgments are relied upon by Federal and State authorities. Covering a wider geographic area than that of a single State, such agencies have direct access to educational expertise on a national or regional basis. This ensures against provincialism and facilitates the free movement among the states of students, faculty, and graduates in the various professions. Also, far more than establishing a minimal base of quality such as would be accomplished by good state regulations, accrediting standards are designed to foster constant educational improvement.

IX

Conclusions

1. The principle of preserving a measure of confidentiality in order to enable an agency to function, when applied to government, is grounded on the creation of the separate governmental functions in the Constitution (executive, legislative, and judicial), and when applied to membership organizations is based primarily on the Bill of Rights (especially associations for the expression of political and social views). But when applied to accrediting agencies, it appears to be more a matter of public policy, to be urged upon legislators considering restrictive legislation against agency operations and upon courts considering sweeping demands to compel disclosure of information of a nature that leads to the improvement of educational standards–information that would not have been given except under conditions of confidentiality.

2. When not controlled by legislation, courts tend to defer to the expertise of accrediting agencies in judging matters of educational quality per se and probably will uphold confidentiality to the extent reasonably necessary to assure candor in the investigative and deliberative process.

3. Investigative teams are well advised to set forth their findings without specific attribution and wherever possible to verify findings independently of the specific sources.

4. Current practices of the U.S. Office of Education are reasonably protective of confidentiality of accreditation files (made available to the Office) in relation to requests under the FIA, but it is not known whether these practices will be followed by other Federal agencies or be confirmed by the courts.

5. Insofar as confidentiality is concerned, a combination of state licensure concentrating on minimum educational quality, truthfulness of advertising, and assurance of financial soundness and private accrediting–concentrating on educational quality and improvement–offers the most effective protection to the accrediting agencies.

6. The same combination, but in terms of the *Model State Statute* in which the state licensing agency may accept the accreditation of the private agency in lieu of its own investigation, may not help preserve confidentiality for the private agency when accreditation is accepted (since the agency may be deemed to have acted for the state or to have exercised a quasi-public function); but it should help in the case of non-accreditation since the institution or program has another avenue for securing an important form of approval for its operations.

7. Irrespective of the existence of licensure laws, an accrediting agency must recognize that if it claims to review ethical practices, financial capacity, and outcome claims or promises, the courts will probably not hold records confidential in fraud or misrepresentation suits where third parties allege reliance on accreditation.

8. In view of the quasi-public nature of the accreditation function, accrediting agencies should restudy their procedures (with respect to records and meetings) to be certain that they are as open to public scrutiny as the essential purposes of accreditation permit. If this principle is clearly followed and publicized, the pressures for burdensome special Sunshine Laws should be considerably reduced.

Notes and References

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2. *Freedom of Information Act,* 5 U.S.C. Section 552.

3. *NAACP v. State of Alabama* 357 U.S. 449, 2 L.Ed.2nd 1488 (1958).

4. 418 U.S. 683, 41 L.Ed. 1039, 1062.

5. See John Bunzel, "The Eclipse of Confidentiality," *Change* October 1975, p. 31; Webster's Third New International Dictionary, 1969, p. 476.

6. Council on Postsecondary Accreditation, *Provisions and Procedures for Becoming Recognized as an Accrediting Agency . . .*, p. 2 (D. 1.)

7. William K. Selden, *Accreditation: A Struggle Over Standards in Higher Education.* New York: Harper and Brothers, 1960, p. 6.

8. Richard A. Fulton and Dana R. Hart, testimony before Senate Subcommittee on Government Operations, December 10, 1975, p. 4.

9. T. H. Bell and W. Keith Warner, addresses delivered to the Joint Annual Meeting of the N.W. Association of Schools and Colleges, et al. Reno, Nevada, December 9, 1975.

10. HEW, *Criteria and Procedures for Listing by the U.S. Commissioner of Education,* June 1975.

11. Frank G. Dickey, testimony before Special Subcommittee on Education, Committee on Education and Labor, U.S. House of Representatives, July 1974.

12. Robert Kirkwood, "The Myths of Accreditation," *Educational Record,* Vol. 54, No. 3 (Summer Issue) 1973.

13. California State Senate, *Report of Fact Finding Commission on Education* 148 (1962 General Session).

14. See generally "The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation," 52 *Cornell L.Q.* 104 (1966).

15. Council on Postsecondary Accreditation, op cit.

16. Ibid.

17. The special nature of accrediting agencies, including the confidentiality of their investigatory work, is demonstrated by the Buckley Amendment governing Federal education aid (Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g), giving such agencies the right to examine student records otherwise protected as confidential under the Act. Such records in the hands of an accrediting agency continue to hold their confidential character under Federal law against any effort to reach them by persons not authorized by the law or by the affected student.

18. *Hanberry v. Hearst Corp.* 276 C.A. 2d 680 (1969).

19. *State of N.D. v N. Central Association of Colleges and Secondary Schools* 23 F. Supp. 694 (E.D. Ill. 1938), *Aff'd*, 99 F.2d 697 (7th Cir. 1938).

20. *Colorado Polytechnic College v. State Board for Community Colleges and Occupational Education*, 476 p. 2d 38 (Colo. 1970).

21. *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*, 432 F. 2d 650, *cert. denied*, 400 U.S. 965 (1970).

22. *Rosenthal v. State Bar Examining Comm.* 165 A. 211 (1933).

23. *Howard University v. NCAA* 510 F.2d 213 (D.C. Cir. 1975); but courts are slow to hold private educational institutions to be state actors. See *Powe v. Miles* 407 F.2d 73 (2nd Cir. 1968); *Grossner v. Trustees* 287 F.Supp. 535 (S.D.N.Y. 1968).

24. "Developments in the Law—Judicial Control of Actions of Private Associations." 76 *Harvard Law Review* 983, 1031 (1963).

25. *State v. Hyman* 171 S.W. 2nd 822 (Tenn. 1942).

26. Civil Action 74-68, U.S. District Court Middle District of Louisiana.

27. *Premium Service Corp. v. Sperry & Hutchinson Co.* 511 F.2d 225 (9th Cir. 1975).

28. *supra*, p. 229.

29. 46 F.R.D. 605 (D.C. 1969).

30. Matthew Finkin, *Federal Reliance on Voluntary Accreditation: The Power to Recognize is the Power to Regulate*, 2 J. of Law & Educ. 339 (1973).

31. HEW, *Criteria and Procedures for Listing by the U.S. Commissioner of Education*, June 1975, pp. 9-14.

32. *supra*, footnote 2.

33. *Washington Research Project, Inc. v. Dept. of HEW*, 366 F.Supp. 929, 937 (D.C. 1973); FIA Section 552 (B) (6).

34. *National Parks & Conservation Association v. Morton*, 493 F.2d 762, 770 (D.C. Cir. 1974); FIA Section 552 (B) (4).

35. *General Education Provision Act*, 20 U.S.C., 31, Sec. 1227 (1972).

36. *Budget and Accounting Act*, 31 U.S.C., 53, 54 (1921).

37. Florida Statutes, Chapters 73-98, amending Sections 119.01 and 119.011, 1973. This specific "Sunshine Law" is to be distinguished from the general type of statute requiring public meetings of boards and commissions and open records of the minutes of such meetings effective in practically all states including Florida. These general laws have not posed any problems for accrediting agencies to date.

38. John R. Proffitt, Director AIES, Office of Education, letter to Dr. Lee Henderson, Division of Community Colleges, Tallahassee, Florida, April 7, 1975.

39. *Florida H.B. 2040,* enacted and approved June 1975.

40. *Assembly Bill 1854,* as amended June 3 and 9, 1975, California Assembly.

41. Opinion of Legislative Counsel, State of California to Albert S. Rodda, February 12, 1976, p. 5.

42. *Pike v. Bruce Church,* 397 U.S. 137 (1970).

43. *State of Washington Ex. Rel. Seattle Title Trust Co., Trustee v. Roberge* 278 U.S. 116 (1928); *Grow Systems School v. Board of Regents* 98 N.Y.S.2d 834 (1950); *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co.* 11 Cal.2d 634, 646-647.

44. *WASC White Paper,* August 1975, p. 3.

45. Education Commission of the States, *Report No. 39,* June 1973; see also William Kaplin, *Respective Roles of Federal Government, State Governments, and Private Accrediting Agencies in the Governance of Postsecondary Education,* COPA 1975, pp. 12-15, which also cites *Pike v. Bruce Church,* supra, Note 42.

46. Maryland appeared to have anticipated this kind of statute. See Sections 151-159 of Article 77 of the *Annotated Code of Maryland, 1969.*

47. As of April 1976 the following states have adopted the model statute in some form: Colorado, Montana, New Mexico, and Tennessee. Colorado is an example of a state limiting the application of the statute to proprietary institutions.

48. *AIES Bulletin,* "The Federal Eligibility System," April 7, 1975, p. 9.

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